UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEIN, INC.

and Cases 09-CA-215131
09-CA-219834

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA (LIUNA), LOCAL 534

INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), LOCAL 18

and Case 09-CB-215147

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA (LIUNA), LOCAL 534

ORDER DENYING MOTION FOR RECONSIDERATION, REHEARING, OR REOPENING THE RECORD

Respondent Stein, Inc.'s Motion for Reconsideration, Rehearing, or Reopening the Record for a portion of the Board's Decision and Order, reported at 369 NLRB No. 10 (2020), is denied.[1] Respondent Stein has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration, rehearing, or reopening the record under Section 102.48(c)(1) of the Board Rules and Regulations.[2]

[1] Respondent Stein filed a brief in support of its Motion for Reconsideration, Rehearing, or Reopening the Record.

[2] In the underlying decision, the Board relied on a different rationale than the judge to find that Respondent Stein violated Sec. 8(a)(5) and (1) by discharging employee Ken Karoly pursuant to a probationary period that it had unlawfully unilaterally extended. Specifically, the Board found that the Respondent unilaterally changed the 90-day probationary period it established in its initial terms and conditions of employment to a probationary period of 90 days of actual work. Respondent Stein principally argues in its motion that the Board's reliance on this rationale was inappropriate because it was not set forth in the unfair labor practice charge, pled in the complaint, or analyzed by the judge. We reject this contention.

The consolidated complaint alleged that Respondent Stein unlawfully exercised its discretion in discharging Karoly based on an unlawful unilateral change to his

probationary period without providing prior notice and an opportunity to bargain to his bargaining representative, Laborers' International Union of North America (LIUNA), Local 534. This "plain statement of the things claimed to constitute an unfair labor practice" is a sufficient recitation of the facts for the complaint to satisfy Sec. 102.15 of the Board's Rules and Regulations. See *Artesia Ready Mix Concrete, Inc.*, 339 NLRB 1224, 1226 (2003) (quoting *NLRB v. Piqua Munising Wood Products Co.*, 109 F.2d 552, 557 (6th Cir. 1940)). Respondent Stein's assertion that the Board inappropriately relied on a legal theory not pled in the complaint is unfounded. The General Counsel is not required to set forth a precise legal theory in the complaint. See *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993) ("The Board's Rules and Regulations require only that the complaint include 'a clear and concise description of the acts which are claimed to constitute unfair labor practices,' not that it include the legal theory relied on.") (quoting Sec. 102.15(b) of the Board's Rules and Regulations). Here, in accordance with the Board's Rules and Regulations, the General Counsel did not lay out any legal theory in the complaint. He alleged facts sufficient to support one rationale for finding a violation, but in doing so did not foreclose others.

The Board permissibly relied on the very facts pled in the complaint to find Karoly's discharge unlawful based on a rationale different from the one advanced by the General Counsel. Doing so did not prejudice Respondent Stein because the facts and circumstances surrounding Karoly's discharge were fully litigated at the hearing. See *W.E. Carlson Corp.*, 346 NLRB 431, 434 (2006) (no deprivation of an employer's due process rights by the Board relying on a different rationale than the General Counsel in finding a violation). Likewise, the Board also permissibly adopted a different rationale than the judge. See id. ("It is well settled that even where the General Counsel has not excepted to an administrative law judge's analysis, the Board 'is not compelled to act as a mere rubber stamp' but rather is 'free to use its own reasoning.'") (quoting *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959)). See also *Local 58, International Brotherhood of Electrical Workers (IBEW), AFL-CIO (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) ("The Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful *conduct* was alleged in the complaint.") (citing cases), enfd. 888 F.3d 1313 (D.C. Cir. 2018). Because it modified the probationary period it established as part of its initial terms and conditions, Respondent Stein acted beyond its rights as a *Burns* successor by making a unilateral change without providing notice and an opportunity to bargain to Karoly's bargaining representative, which is the unlawful conduct alleged in the complaint.

Lastly, notwithstanding the position statement Respondent Stein provided to Region 9, there is no support in the record for Respondent Stein's claim that the initial terms and conditions it established for Karoly and the other unit employees included a "90-day working probationary period." Respondent Stein's assertion is belied by its unambiguous November 9, 2017 handout to unit employees establishing that they "will be subject to a 90-day probationary period," which did not include the "days of actual work" qualifier that was set forth in the unlawful collective-bargaining agreement it subsequently reached with Respondent International Union of Operating Engineers,

Dated, Washington, D.C., March 17, 2020.

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JOHN F. RING, CHAIRMAN

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MARVIN E. KAPLAN, MEMBER

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WILLIAM J. EMANUEL, MEMBER

(SEAL) NATIONAL LABOR RELATIONS BOARD

Local 18 that it applied to Karoly. Although the Respondent also requests a reopening of the record, it has not stated the additional evidence that it would seek to adduce, such as evidence supporting its unsubstantiated claim that the initial terms and conditions of employment that it established included a "90-day working probationary period," as required under Sec. 102.48(c)(1) of the Board's Rules and Regulations.